



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

**NOV 26 2013**

James R. Holden  
Campaign Manager & Counsel  
Hoosiers for Richard Mourdock, Inc.  
P.O. Box 1583  
Indianapolis, IN 46203

RE: MUR 6684  
Gregg for Indiana, *et al.*

Dear Mr. Holden:

This is in reference to the complaint you filed with the Federal Election Commission on November 1, 2012, concerning Gregg for Indiana and John Gregg. After considering the circumstances of this matter, the Commission determined to dismiss this matter and closed the file on November 19, 2013. The Factual and Legal Analysis, which more fully explains the basis for the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

Daniel A. Petalas  
Associate General Counsel for Enforcement

BY: William A. Powers  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 RESPONDENTS: Gregg for Indiana  
6 John Gregg

MUR 6684

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8 **I. GENERATION OF MATTER**

9 This matter was generated based by a Complaint filed with the Federal Election  
10 Commission ("Commission") by James R. Holden. See 2 U.S.C. § 437g(a)(1). This matter  
11 involves allegations that John Gregg, the 2012 Democratic candidate for governor of Indiana,  
12 and Gregg for Indiana, his state campaign committee, violated the Federal Election Campaign  
13 Act of 1971, as amended (the "Act"), when they paid for an advertisement that allegedly  
14 attacked Mike Pence, Gregg's Republican opponent, and Richard Mourdock, the Republican  
15 candidate for U.S. Senate from Indiana. Public communications that "refer to a candidate for  
16 federal office and that promote, attack, support, or oppose ('PASO') a candidate for that office,"  
17 are considered "federal election activity" — a category of activities required to be paid for with  
18 funds subject to the limitations and prohibitions of the Act. See 2 U.S.C. §§ 431(20)(A)(iii),  
19 441i(f)(1). Gregg and Gregg for Indiana maintain that they did not violate the Act or  
20 Commission regulations because the advertisement does not "attack" or "oppose" Mourdock.  
21 The Commission exercises its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821  
22 (1985) and dismisses the allegation that Gregg for Indiana and John Gregg violated 2 U.S.C.  
23 § 441i(f)(1).

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1     **II.     FACTUAL AND LEGAL ANALYSIS**

2             **A.     Factual Background**

3             The Complaint asserts that the Respondents violated 2 U.S.C. § 441i(f) and 11 C.F.R.  
4     § 300.71 by using non-federal funds to pay for a public communication that “attacked” a federal  
5     candidate. Compl. at 1. Unlike the Act, Indiana campaign finance law permits state candidates  
6     to accept unlimited individual contributions and contributions of up to \$5,000 from corporate and  
7     labor organizations, and therefore funds raised by a state candidate may not be federally  
8     permissible. *See* IND. CODE § 3-9-2-4; *see also* [http://campaignfinance.in.gov/PublicSite/](http://campaignfinance.in.gov/PublicSite/AboutReporting.aspx)  
9     AboutReporting.aspx. A review of Gregg for Indiana’s disclosure reports filed with the Indiana  
10    Secretary of State confirmed that the Committee accepted corporate contributions, labor  
11    organization contributions, and individual contributions in excess of the federal limits. *See*  
12    <http://campaignfinance.in.gov/PublicSite/SearchPages/CommitteeDetail.aspx?OrgId=6174>.

13            The advertisement, entitled “Back and Forth,” began airing on October 30, 2012. Compl.  
14    at 2. Public records attached to the Complaint show that Gregg for Indiana paid approximately  
15    \$260,000 to air the advertisement through November 6, 2012. Compl., Attach. 2. The  
16    advertisement generally provides a series of comparative statements and positions associated  
17    with Mourdock, a candidate for federal office, and Pence, Gregg’s gubernatorial opponent;

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Male voiceover:	Richard Mourdock
Video clip of Mourdock:	"I think the Tea Party movement is one of the most exciting political activities in my lifetime."
Male voiceover:	Mike Pence
Video clip of Pence: On-screen news banner: CONGRESSIONAL TEA PARTY CANDIDATES RALLYING IN WASHINGTON TODAY	"Uhh, we'll welcome the Tea Party with open arms."
Male voiceover:	How they'd govern...
Video clip of Mourdock: On-screen news banner: REPUBLICAN REBELLION MOURDOCK: MUST CHANGE THE WAY SENATE LEADERSHIP THINKS	"To me, the highlight of politics, frankly, is to inflict my opinion on someone else."
Video clip of Pence:	"Let's go pick a fight."
Male voiceover:	And even after Mourdock said pregnancy from rape was something...
Video clip of Mourdock: On-screen news banner: INDIANA SENATE DEBATE RICHARD MOURDOCK Indiana, Candidate for U.S. Senate	"...God intended to happen."
Video clip of Pence:	"I support his candidacy for the Senate."
Male voiceover: On-screen photo of John Gregg Caption: JOHN GREGG FOR GOVERNOR PAID FOR BY GREGG FOR INDIANA	You can stop the Tea Party with Governor John Gregg.

1  
2 Gregg and Gregg for Indiana assert that "Back and Forth" does not "attack" or "oppose"  
3 Mourdock and therefore could be paid for with non-federal funds without violating the Act.  
4 Resp. at 2. The Response contends that by including Mourdock in the advertisement, the Gregg  
5 campaign's goal was to link Pence with Mourdock's views regarding the Tea Party and abortion,  
6 which had received significant national media attention in the week before the advertisement  
7 began airing. *Id.* The Response asserts that at the time of the advertisement's airing,  
8 Mourdock's campaign had fallen significantly behind his opponent, while Pence's response to  
9 Mourdock's views had become an issue in the Indiana gubernatorial election. *Id.* at 1-2. The

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1 Response also claims that the content of the advertisement demonstrates it did not “attack” or  
 2 “oppose” Mourdock. *Id.* at 3. Not only did the advertisement avoid a reference to Mourdock’s  
 3 candidacy, but, as the Response points out, the final tagline of the advertisement — “You can  
 4 stop the Tea Party with Governor John Gregg” — only mentions Gregg. *Id.* The Response  
 5 further asserts that, even if the advertisement presents a close call as to whether it attacks or  
 6 opposes Mourdock, the Commission should not use the enforcement process to define PASO, a  
 7 standard for which the Commission has purportedly failed to provide any meaningful guidance.  
 8 *Id.* at 3-4.

#### 9 B. Legal Analysis

10 The sole issue in this matter is whether the “Back and Forth” advertisement attacks or  
 11 opposes federal candidate Richard Mourdock, such that Gregg for Indiana was required to pay  
 12 for the advertisement with federal funds.

13 The Act prohibits a candidate for state or local office or an agent of such candidate from  
 14 spending any funds for public communications that qualify as “federal election activity”  
 15 (“FEA”), unless the funds are subject to the limitations, prohibitions, and reporting requirements  
 16 of the Act. 2 U.S.C. § 441i(f)(1); 11 C.F.R. § 300.71. Public communications are considered  
 17 FEA, and thus regulable under the Act, if they refer to a candidate for federal office and they  
 18 promote, attack, support, or oppose a candidate for that office, regardless of whether the  
 19 communication expressly advocates a vote for or against a candidate.<sup>1</sup> 2 U.S.C.  
 20 § 431(20)(A)(iii). Public communications are not FEA, however, and thus not federally  
 21 regulated, if they are in connection with an election for a state or local office and refer only to the

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<sup>1</sup> The term “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 2 U.S.C. § 431(22).

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1 candidates for the state or local office, but do not promote, attack, support, or oppose any  
2 candidate for federal office. 2 U.S.C. § 441i(f)(2); 11 C.F.R. § 300.72.

3 Congress included the PASO standard in the Bipartisan Campaign Reform Act of 2002  
4 (“BCRA”), but neither Congress nor the Commission has defined the concept. BCRA lacked a  
5 definition of the PASO terms and the Commission has twice proposed but not adopted  
6 definitions for PASO. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. 35,654, 35,681  
7 (May 20, 2002) (Notice of Proposed Rulemaking); Coordination, 74 Fed. Reg. 53,893, 53,898-  
8 900 (Oct. 21, 2009) (Notice of Proposed Rulemaking).<sup>2</sup> Despite the lack of a statutory or  
9 regulatory definition, the PASO terms themselves “clearly set forth the confines within which  
10 potential party speakers must act in order to avoid triggering the provision,” and they “provide  
11 explicit standards for those who apply them and give the person of ordinary intelligence a  
12 reasonable opportunity to know what is prohibited.” *McConnell v. FEC*, 540 U.S. 93, 170 n.64  
13 (2003).

14 In a series of advisory opinions that applied the PASO standard, the Commission has  
15 determined that the mere identification of an individual as a federal candidate in a public  
16 communication — such as when a federal candidate endorses a state candidate — does not, by  
17 itself, promote, attack, support, or oppose the federal candidate. *See* Advisory Op. 2007-34  
18 (Jackson); Advisory Op. 2007-21 (Holt); Advisory Op. 2003-25 (Weinzapfel). In Advisory  
19 Opinion 2009-26 (Coulson), the Commission provided guidance on when a federal candidate’s  
20 state committee or state office account could pay for a communication. The Commission

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<sup>2</sup> Despite the lack of a definition, Congress clearly did not intend the FEA provisions to prohibit “spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose a Federal candidate.” Statement of Sen. Feingold, 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002).

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1 concluded that non-federal funds could be used to pay for a "health care legislative update" letter  
2 because the communication was solely related to state officeholder duties, did not solicit any  
3 donations, and did not expressly advocate the candidate's election or the defeat of her opponents.  
4 Advisory Op. 2009-26 (Coulson) at 8. The Commission did state, however, that the following  
5 phrases could be construed to promote or support Representative Coulson: (1) "I have remained  
6 committed to making progress for the residents of this State," and (2) "I will continue to look for  
7 innovative ideas to help improve the healthcare system in Illinois, as well as help improve the  
8 lives of those who need our care." But the Commission determined that non-federal funds could  
9 be used to pay for the letter because the adjectives were used to "address Coulson's past and  
10 ongoing legislative actions as a state officeholder" rather than her qualities as a candidate. *Id.* at  
11 9.

12 Here, the advertisement at issue focuses on the Indiana gubernatorial election,  
13 specifically in opposition to Pence and in support of Gregg. Mourdock's statements are included  
14 in a manner that links Pence to Mourdock's views and party affiliations, and the statements are  
15 offered without commentary. Although Gregg attacks Pence by linking his policy positions with  
16 Mourdock, the advertisement's tagline — "You can stop the Tea Party with Governor John  
17 Gregg" — emphasizes the ad's purpose, to support Gregg.

18 Assuming, *arguendo*, that the advertisement could be interpreted as opposing Mourdock  
19 under the PASO standard, the ad focuses on the Indiana gubernatorial election and does not  
20 exhort viewers to vote against Mourdock. For these reasons, the Commission exercises its  
21 prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) and dismisses the  
22 allegation that Gregg for Indiana and John Gregg violated 2 U.S.C. § 441i(f)(1).

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